FILED
OCT 3 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

—v.—

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 71-732

MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center,

Petitioner,

—v.—

ROBERT CLYDE BUSTAMONTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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Interest of *Amicus Curiae**

The American Civil Liberties Union is a nation-wide, non-partisan organization with over 170,000 members in the United States. Its affiliates in California are the ACLU of Southern California, and the ACLU of Northern California. The ACLU is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-two year existence, the ACLU has been concerned with both the integrity of the judicial process and the protection of Fourth Amendment rights from the unlawful actions of state and federal officials.

These cases present significant issues concerning the substance and sanctions of the Fourth Amendment. At stake are the integrity of the criminal justice process and the effective protection of Fourth Amendment rights, not only for those charged with and prosecuted for crimes, but for us all.

On the issues presented as to the scope of the substantive protections of the Fourth Amendment, we would like to associate with the ably presented positions of Respondents. Our sole purpose is to suggest several additional considerations concerning the exclusionary rule to guide the Court should it reach those issues.

Summary of Argument

The exclusionary rule gives substance to the individual's rights to be free from unreasonable search and seizures in two ways: (1) it serves to uphold the integrity of the courts and the criminal justice system; and (2) it deters the law

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

enforcement apparatus from gathering evidence of criminal conditions by unconstitutional means.

I.

The exclusionary rule derives from the Constitution and not solely from the Court's supervisory power. *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Thus the rule compels the Court to shun knowing collaborations in the deprivation of constitutional rights, regardless of how inadvertent the initial violation of rights may have been. Citizens are assured that whatever improprieties occur on behalf of the executive branch of government, the courts will not participate in furthering the injury.

II.

Deterrence is effected by rendering conviction on the basis of illegally seized evidence impossible. Recent evidence shows that as police departments become more professional, conviction rates become a more significant index of success in police work. The exclusionary rule has encouraged and continues to encourage the trend toward professionalization of the police. Without the absolute exclusion of illegally seized evidence, police will be encouraged by the dictates of efficiency to ignore constitutional values.

III.

The "substantial violation" rule proposed by Petitioners in *Krivda* as a substitute for the exclusionary rule would impugn the integrity of the courts and would substantially eviscerate the deterrent effect of the current rule. Measured against Petitioner's own criticisms of the exclusionary rule, the "substantial violation" rule would exacerbate the difficulties police and courts have and would have under the

exclusionary rule. Furthermore, the "substantial violation" rule would turn court attention from the protection of the individual's rights to a determination of the fault of the police, thus putting the police on trial rather than the defendant.

IV.

Finally, Petitioner's suggestion that exclusionary rule claims be made unavailable to state prisoners seeking federal habeas corpus relief would wreak havoc with this Court's precedential development of the Great Writ. See, e.g. *Fay* v. *Noia*, 372 U.S. 391 (1963). Nor are the causes of judicial integrity or deterrence served by this illogical distinction between collateral attack and direct appeal. The principal impact of such a distinction would be to deprive most state criminal defendants of a federal forum for adjudication of their federal rights, thereby undermining what even severe critics agree is a primary benefit of the exclusionary rule.

ARGUMENT

Preliminary Statement

To argue that the exclusionary rule fails to protect adequately the constitutional rights of citizens is to state the obvious. Yet to argue that the rule fails to protect the rights of anyone would be false. Rather, the argument against the exclusionary rule seems to turn on its presumed failure directly to protect anyone other than those accused of crime. We do not agree with this analysis. But even if the assumption is made *arguendo*, the degree of constitutional protection that obviously is afforded by the exclusionary rule justifies its continued existence.

Despite the existence of criminal activity in every socio-economic stratum of our society, the primary clientele of the criminal justice system are drawn from the lowest stratum. *President's Commission on Law Enforcement and Administration of Justice,* THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), at 43-45. They are the very young, the poor, the powerless. By reason of their ignorance, their lack of professional assistance, or plea bargains struck on their behalf, they are the persons most easily dissuaded from pursuing affirmative remedies to redress violations of their constitutional rights. Their plight is least visible to those who mold public opinion. Indeed, public opinion will most likely demand that they be dealt with harshly and efficiently. Hence without the exclusionary rule they are without any defense against the unconstitutional intrusions of state and federal officers. But the success of a democracy is measured by the quality of life of its most oppressed citizens. What this Court does to protect the rights of the most wretched criminal will symbolize to the country and the world the extent of individual liberty in the United States. See, e.g., T. Arnold, *The Criminal Trial as a Symbol of Public Morality,* in CRIMINAL JUSTICE IN OUR TIME 137 (Howard ed. 1965); S. Rosen, *Contemporary Winds and Currents in Criminal Law, With Special Reference to Constitutional Criminal Procedure,* 27 MD. L. REV. 103, 108-114 (1967). Thus we urge this Court to stand firmly in support of the exclusionary rule of the Fourth Amendment.

I.

The exclusionary rule is constitutionally compelled and is essential to the integrity of the courts and the criminal justice system.

Petitioners direct their attack upon the exclusionary rule to the issue of deterrence, deliberately failing to acknowledge that they are asking this Court to participate in and sanction prosecutorial deprivations of constitutional liberties. It has long been settled that courts cannot wash their hands of the manner in which evidence is brought before them. E.g., *McNabb* v. *United States,* 318 U.S. 332 (1943). To find on the one hand that the state has violated a defendant's Fourth Amendment rights in obtaining evidence against him, and then to find on the other hand that his conviction based upon such evidence has been obtained consistent with the requirements of due process of law is unacceptable logic. This Court cannot pretend to uphold the Constitution when it lends its offices to such use of illegally seized evidence. In the strictest sense, this Court did not fashion a remedy for illegal searches and seizures when it enunciated the constitutional requirement of the exclusionary rule in *Weeks* v. *United States,* 232 U.S. 383 (1914) and again in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). It merely stated its refusal consciously to facilitate and reward the unconstitutional activities of the executive branch. What was true for Mr. Justice Brandeis in 1928 is even more appropriate today when the integrity of governmental institutions is being questioned from all quarters:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupu-

> lously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

Some critics have argued that the exclusionary rule was a product of the Court's supervisory power and is not constitutionally compelled, despite the clear language of *Weeks* in which Mr. Justice Day found the trial court's refusal to suppress illegally obtained evidence "a denial of the constitutional rights of the accused." 232 U.S. at 398. The Court appeared to waver on this issue in *Wolf* v. *Colorado,* 338 U.S. 25 (1949), but in *Mapp,* Mr. Justice Clark repeatedly emphasized the constitutional basis of the exclusionary rule:

> There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. 367 U.S. at 649.

Petitioners argue that the integrity—or at least the popularity—of the courts is under attack because some criminals

go free as a result of the exclusionary rule. When the exclusionary rule is virtually the only mechanism through which violations of individual rights are vindicated, popular feeling for the courts and for the rights they protect may well be affected. But any current misunderstanding of the protection against unlawful searches and seizures or the exclusionary rule is not caused by our constitutional tradition of judicial responsibility. Rather, the fault lies with the executive and legislative branches of government which have neglected the establishment of other effective civil and criminal remedies against unconstitutional police conduct. If the exclusionary rule standing alone distorts the public's picture of what the Fourth Amendment is all about, it must be supplemented—not watered down or abandoned—to teach the public the value of individual liberty.

II.

The exclusionary rule is a necessary condition for effective deterrence of illegal police conduct.

Our thesis is simple: this Court has been correct in holding since 1914 that the exclusionary rule is a necessary first condition in any judicial program to deter illegal police conduct.

It is important to recognize at the outset that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice apparatus. Thus the exclusionary rule is not truly a sanction directed at the individual police officer, either by its terms or by its effect—hence the absence of any terms placing "blame" on the police officer. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the magistrate, to the prosecutor, to the trial judge. Indeed, one of the difficulties in tracing the deterrent effect of the rule is that each of the participants in the criminal justice process is reacting to a different set of goals and group norms. See, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 149-60 (1969); H. Packer, *Two Models of the Criminal Process,* in THE LIMITS OF THE CRIMINAL SANCTION, pp. 149-73 (1968). The exclusionary rule focuses on one goal more or less common to all aspects of the system—the conviction of offenders—but fails to address other goals held by different agencies within the system.

Police have as their primary goal the detection and control of criminal conduct. One of a number of methods of

achieving this goal is to place as many criminals as possible behind bars, a technique best accomplished by making a "good pinch," i.e. an arrest leading to conviction of the offender. To be sure, other methods exist by which the police may achieve their goal in whole or in part, including harassment of petty offenders, confiscation of contraband, and use of the threat of arrest to obtain underworld informers, to name a few. Deterrence of these and other techniques of crime control, which may involve unconstitutional police practices, generally requires sanctions other than the exclusionary rule.

It is important to acknowledge that the generalized goals of crime control often conflict with values of the Fourth Amendment. H. Packer, *Two Models of the Criminal Process, supra;* J. Skolnick, JUSTICE WITHOUT TRIAL, 220 (1966). Individual police officers may, in their roles as citizens, sense some compunctions about breaking into a private residence without a warrant, but the demands of their jobs conflict with such scruples. It is only when such values are translated into the values associated with good police work that they become effective influences upon police conduct:

> My observations suggest . . . that norms located within police organization are more powerful than court decisions in shaping police behavior, and that actually the process of interaction between the two accounts ultimately for how police behave. This interpretation does not deny that legal rules have an effect, but it suggests that the language of courts is given meaning through a process mediated by the organizational structure and perspectives of the police. J. Skolnick, JUSTICE WITHOUT TRIAL, *supra,* 219-20.

We draw two conclusions about the utility of the exclusionary rule from Skolnick's observation: (1) without sanctions such as the exclusionary rule, court pronouncements on the meaning of the Fourth Amendment will fall on deaf ears as they did prior to *Mapp;* and (2) any failings of the exclusionary rule to date can be ascribed to shortcomings in the translation of judicially articulated values to police work values. The latter point receives substantiation from LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions,* 63 MICH. L. REV. 987, 1012 (1965):

> As for the exclusionary rule, its limited impact [on police officials] is attributable in large measure to inadequate communication between the police and the courts.

One solution is for prosecution and police officials to educate the police officer on the beat as to his constitutional obligations. Much has been accomplished in the last five years. Since the President's Commission on Law Enforcement and Administration of Justice proposed in 1967 that all police departments employ full or part-time legal advisers (THE CHALLENGE OF CRIME IN A FREE SOCIETY, 114), over 100 metropolitan police departments have established such positions. One function for these advisers, only recently coming into vogue, has been to make rules for police conduct in typical, on-the-street situations. Police training manuals have likewise undergone substantial revisions with new emphasis being placed on constitutional and statutory obligations in police work. Progressive departments are encouraging their officers to take on new training and education programs which, among other things, sensitize police

officers to the mandates of the Constitution. And in Washington, D. C., the police are experimenting with an even more far-reaching mechanism for the legal education of their officers, described by Chief Jerry Wilson and Department General Counsel Geoffrey Alprin in an article soon to be published in LAW AND CONTEMPORARY PROBLEMS:

> In the District, we have recently begun an experiment for surfacing, for the benefit of higher officials in the Department, those non-prosecuted cases which before have never reached the attention of the courts and seldom have been reviewed within the Department. In cooperation with the local United States Attorney's Office, the Department has created a specialized unit, staffed with police officials, with responsibility for reviewing every case which is dropped by the prosecutor, for whatever reason. Errors in police procedures, whether of exclusionary rule character or not, are brought to the attention of the offending officer and his commanding official, who is required to insure that the officer is counselled and instructed in proper processes. The Case Review Section maintains records by officer and unit so that recurrent patterns of misconduct or procedural error can be observed and corrected. In those areas where direct Department orders apply, as, for example, the identification of automobile search orders, egregious or repetitive errors may be dealt with through the Department's disciplinary processes. To offset particularly significant patterns adversely affecting prosecution of cases, members of the Section regularly instruct recruit and in-service training classes at the Department's Academy. Statistics are maintained by the Section and are available to the public.

We join with the *amicus* brief of Americans for Effective Law Enforcement (AELE) in noting the rising degree of professionalism in police departments around the country. Unlike that organization, however, we recognize the role the exclusionary rule has played both in initiating the trend and in maintaining it. What the description of Wilson and Alprin tells us is that the better-run police departments in this country place a very high value indeed on conviction rates. The Case Review Section was born out of a desire to reduce the "no paper" or no court action rate of the prosecutor's office, estimated by the authors at better than twenty per cent (see also, "1 in 5 Charges Dropped," The Washington Post, March 29, 1972, §C at p. 1, col. 8), a substantial portion of which results from exclusionary rule violations. We believe that the exclusionary rule is largely responsible for bringing police departments out of the dark ages of the third degree, that police departments are becoming increasingly sensitive to constitutional limitations as they affect conviction rates (and not out of any new-found altruism), and that future refinement of police procedures is largely dependent on retention of the exclusionary rule and the addition of affirmative sanctions and remedies for gross forms of police negligence and willful misconduct.

For police departments less professional than that of the District of Columbia, the exclusionary rule may play a less significant deterrent role because of the reduced emphasis on conviction rates as an index of police success. But for this Court to modify or remove the constitutional requirement of the exclusionary rule is to tell more progressive departments that they may increase efficiency without refining police procedures to protect the rights of citizens.

Such an alteration of the rule would retard progress where it is now under way, while having little or no effect on the operations of less professional police departments.

To suggest, as does the AELE (*amicus* brief at 18-19), that police are just as likely to behave constitutionally without the exclusionary rule because of internalized notions of professionalism is to deny what every police officer and every citizen knows: police observance of Fourth Amendment safeguards is inefficient in that it requires police to make greater allocation of energy, than would be true in their absence, to achieve proper law enforcement goals. Professionalism in police work, as in most occupations, places a high premium on efficiency, and indeed most criticisms of the exclusionary rule center on the inefficiency it produces in law enforcement efforts. Due process and efficiency in law enforcement are necessarily conflicting goals, and the AELE knows it.

To suggest, as does the Attorney General of Illinois (*amicus* brief at 7-8), that police misconduct can be effectively controlled by community opinion is utterly baseless and is contrary to this Court's long experience in reviewing police procedures. The primary clientele of the criminal justice system comes from the lowest socio-economic classes, many of whom are members of racial minorities. The Challenge of Crime in a Free Society, *supra*, 44-45. This group (and police practices toward them) is the least visible of any in our society to those who lead community opinion. The average criminal defendant is as powerless as almost anyone in America; he is the one most in need of precise, prophylactic constitutional rules.

Finally, we are unable to report any empirical studies of satisfactory methodology which indicate either the exist-

ence or absence of deterrence of unconstitutional police practices as a result of the exclusionary rule. The most ambitious of these studies, though appended by many harsh words for the exclusionary rule, proves nothing:

> . . . The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709 (1970).

Nor do the figures of the AELE on appellate cases (*amicus* brief at 12-17) prove anything about current levels of police compliance with court rulings. Many cases of police misconduct never reach the charging stage. Of those that do, many are dropped immediately by the prosecutor, some by reason of patently illegal police conduct. Of those prosecuted, roughly 90% result in guilty pleas; and of these cases, many have been plea bargained for a reduced charge because there existed in the case a viable exclusion of evidence issue. Of the remaining cases, most are resolved at trial without appeal. Thus AELE has succeeded only in demonstrating that in the scale of virtues of criminal defense attorneys, tenacity can lead to one's client's freedom.

Thus the evidence on deterrence is summarized simply. On the one hand, increasing professionalism in police departments across the country shows a higher value being placed on conviction rates, the police goal most directly influenced by the exclusionary rule. On the other hand, no satisfactory empirical study exists to prove whether the rule does or does not deter. We believe the inadequacies of

statistical studies are insufficient reason to abandon a rule which makes good common sense as well as at least symbolizes and possibly vindicates the unquestioned constitutional values of the Fourth Amendment.

III.

Petitioners' "substantial violation" test would reduce deterrence and create confusion for the courts.

Petitioners' proposal of a "substantial violation" test is certainly not very original. Their sketch of "the substance of the criteria" of § 8.02(2) of the American Law Institute, Model Code of Pre-Arraignment Procedures, p. 23 (Tent. Draft No. 4, 1971) (Pet. Brief in *Krivda* at 51-52), is nothing more than a warmed-over version of the "shocks the conscience" test put to rest by this Court in *Mapp*.

At the outset it is necessary to expose petitioners' rather deceptive allusion to the ALI proposal. Petitioners' proposed rule may represent "the substance of the criteria" of the ALI proposal (Pet. Brief in *Krivda* at 52, n. 6), but the differences between the two are far more substantial than the similarities. The ALI version purports to effect no changes in the essential *Mapp* rule requiring automatic exclusion of evidence seized in violation of the Fourth Amendment. The ALI "substantial violation" rule is aimed only at those violations of the Model Code's provisions which are not of constitutional dimension. Petitioners' proposed rule, however, would apply to *constitutional* violations, thereby requiring the Court to overrule *Mapp*. This rule is more closely related to Senate Bill No. 2657, 92nd Congress, 1st Session, which likewise ignores the subtleties of the ALI position. Petitioners are in good company, however, as

Professor Charles Alan Wright, normally a more careful scholar, has committed the same oversight. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 745 (1972).

Unlike the ALI proposal which purports to add to the exclusionary rule, Petitioners' proposal would gut it. Petitioners and their allies would ask the trial courts in suppression hearings to balance such criteria as the willfulness of the police misconduct and the extent to which the police conduct deviated from Fourth Amendment norms. The Attorney General of Illinois even suggests (*amicus* brief at 12) that the trial judge take into account the seriousness of the crime charged, a criterion which, as a matter of practicality, also lurks in the background of petitioners' statement of the proposed rule.

Amici find it curious that petitioners' proposed rule, when considered against the backdrop of the many criticisms of the current exclusionary rule, not only fails to resolve those criticisms, but actually exacerbates them. Consider the following:

1) Critics charge that under the exclusionary rule, the policeman rather than the criminal is on trial.

Response: The "substantial violation" rule focuses court attention on the degree of the policeman's fault in conducting the illegal search and seizure. The officer is required to defend his judgment and his good faith in executing the search and seizure. If the violation is truly substantial, the officer may take refuge in perjury or he may be well-advised to invoke the privilege against self-incrimination in the

suppression hearing. If the seriousness of the defendant's alleged crime is to be taken into account, either explicitly or implicitly, the suppression hearing will become a battle over whose offense was greater, that of the defendant or that of the police officer. It is unreasonable to assume that the defendant would ever win such a contest. The fault of the officer is relevant to civil and criminal litigation and department disciplinary proceedings against him, but is irrelevant to the issue of suppression.

2) Critics charge that the exclusionary rule does not deter because no police officer can understand or keep up with all the case law on the Fourth Amendment.

Response: Under the "substantial violation" rule, the officer must learn not only the substantive law of the Fourth Amendment, but he must be well acquainted with the predilections of local judges in finding what constitutes a "substantial violation" of the Fourth Amendment. If the substantive law of the Fourth Amendment is uncertain, consider the uncertainty inherent in a case-by-case evaluation by all the trial judges in the country of what "substantial violation" means. Courts will be asking themselves whether the police officer conducted a "reasonable or unreasonable" unreasonable search and seizure. It is difficult to imagine a rule which would cause greater confusion to the average police officer.

3) Critics charge that the exclusionary rule generates countless pre-trial suppression motions which delay trial of the offender, thereby diluting the efficacy of the criminal sanction.

Response: Criminal defendants will be just as willing to file suppression motions under the "substantial violation" rule. Pre-trial hearings on such motions are likely to become more complex than they are now under the relatively simple, automatic exclusionary rule. In addition, if interlocutory appeals of pre-trial suppression hearings are permitted, as some have proposed, the criminal process will become even more drawn out then it is today.

4) Critics charge that the exclusionary rule encourages police perjury.

Response: Under the "substantial violation" rule, police will have even greater reason to perjure themselves, since civil and criminal litigation and department disciplinary proceedings may ensue. In addition, the flexibility and subjectivity of the proposed rule makes perjury easier. Nor can we feel any better about honest and open violations of the law about which the courts can do nothing.

5) Critics charge that the exclusionary rule encourages police officers to engage in harassment and other law enforcement tactics which do not anticipate formal arrest and prosecution.

Response: Under the "substantial violation" rule, police officers will receive even greater encouragement to employ such tactics, knowing that a suppression hearing may implicate them for civil and criminal litigation and for department disciplinary proceedings.

6) Critics charge that since the exclusionary rule is only minimally effective, we should try something different.

Response: The "substantial violation" rule has been tried at the Supreme Court level and has been found unworkable because of its subjectivity. *Rochin* v. *California,* 342 U.S. 165 (1952); *Irvine* v. *California,* 347 U.S. 128 (1954). The chaos which would ensue were it to be attempted by trial judges around the country ruling in suppression hearings is almost inconceivable.

In short, we urge that adoption of the hastily contrived "substantial violation" rule would come close to eliminating whatever deterrence the exclusionary rule provides, would cause chaos in the trial and appellate courts, and would fail to ameliorate—and in most cases would exacerbate—the unfortunate side effects of the exclusionary rule which critics have set forth to date.

IV.

There is no reason in law or policy to distinguish between trial and habeas corpus in applying the exclusionary rule.

What petitioners could not accomplish at trial, this Court should not permit them to achieve by limiting collateral attack. *Kaufman* v. *United States,* 394 U.S. 217 (1969), one of a number of cases which petitioners ask the Court to overrule (Petitioners' Brief in *Bustamonte* at 25), is of only marginal relevance to the issue now before the Court. (In *Kaufman,* this Court recognized the right of federal prisoners to raise exclusionary rule issues collaterally.) Petitioners' argument to make claims based on the exclusionary rule unavailable to state prisoners in federal habeas corpus strikes at the very heart of the Court's extensive development of the Great Writ. Cf. *Moore* v. *Dempsey,* 261 U.S. 86 (1923); *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Brown* v. *Allen,* 344 U.S. 443 (1953); *Fay* v. *Noia,* 372 U.S. 391 (1963).

We need not duplicate respondent's excellent, concise history of the development of the Writ (Respondent's Brief in *Bustamonte* at 21-28). We shall only highlight by noting that the point at which the Court turned the corner on opening federal habeas corpus "to inquire into every constitutional defect in any criminal trial" (*Williams* v. *United States,* 401 U.S. 646, 685 (1971) (Harlan, J., concurring and dissenting)) occurred definitively in *Brown* v. *Allen, supra,* which in turn was largely guided by the result in *Moore* v. *Dempsey. Kaufman* is no more than a recent, logical application to collateral attacks by federal prisoners of the

principles set out in *Moore, Brown,* and *Fay* v. *Noia, inter alia.*

Recent growth in the habeas corpus docket of the federal courts can be traced in large part to elaborate judicial development of the substantive meaning of the Fourth Amendment. Constitutional issues in criminal proceedings have become more complex since *Brown* v. *Allen* and have created greater divisions within the Court, thereby spawning more extensive litigation. But the basic principle of *Moore* and *Brown* and the policy reasons which support it (ably presented in Respondent's Brief in *Bustamonte* at 28-31) have remained unchanged. To exclude exclusionary rule claims from consideration in collateral attack would remove from federal district court jurisdiction many of the constitutional issues which have arisen in criminal proceedings in the last decade, most of which find no other vehicle to reach the federal courts. The Court would deprive litigants of a lower federal forum for the resolution of these complex constitutional issues and, at the same time, would increase pressure on its own docket to resolve these issues itself on appeals from state courts. Even the most outspoken critics of the exclusionary rule have conceded its virtue as:

> . . . a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Oaks, *op. cit. supra,* at 756.

Petitioners further muddy the water by taking out of context the words of California Chief Justice Roger Traynor in *In re Sterling,* 63 Cal.2d 486, 47 Cal. Rptr. 205, 407 P.2d 5 (1965) (Petitioners' Brief in *Bustamonte* at 26-27). In *Sterling,* petitioners' request for *state* habeas corpus relief was denied after direct appeals on the identical constitutional issue had been turned down. Chief Justice Traynor noted that petitioners had had their day in state courts on the issue, and that petitioners' proper remedy lay in federal habeas corpus. Far from supporting Petitioners in the instant case, *Sterling* indicates the reliance of state court judges on the federal district court habeas corpus jurisdiction to give federal answers to federal questions.

What deterrence occurs as a result of the exclusionary rule, occurs equally whether the final judicial word in a given case comes from this Court, a federal district court, a state supreme court, a trial court, or from the prosecutor's office when a case is "no-papered." The issue of how a court's pronouncements on the exclusionary rule reach the police officer on the beat is not affected by which court renders the final judgment, but rather by factors pertaining to internal police administration. Petitioners have come up with no new distinctions of law in this case; they are very simply attempting to have the Court gut the exclusionary rule through a circuitous route. Their objective is wrong, for the reasons set out in Parts I to III of this brief. Their tactic requires the rewriting of federal law on habeas corpus and has been repeatedly determined by this Court to be fundamentally unsound.

CONCLUSION

In *California* v. *Krivda*, No. 71-651, amici respectfully request this Court, should it reach the issues, to affirm the decision on federal constitutional grounds.

In *Schneckloth* v. *Bustamonte*, No. 71-732, amici respectfully request this Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 1972